



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 17 2013

Richard Forsten, Esq.
Saul Ewing
222 Delaware Avenue, Suite 1200
Wilmington, Delaware 19801

RE: MUR 6649
Republican State Committee of
Delaware and William E. Smith in
his official capacity as treasurer

Dear Mr. Forsten:

On September 25, 2012, the Federal Election Commission notified your clients, the Republican State Committee of Delaware and William E. Smith in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint and information supplied by you, the Commission, on September 10, 2013, voted to dismiss this matter and closed the file. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

If you have any questions, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548.

Sincerely,

A handwritten signature in cursive script, reading "Susan L. Lebeaux".

Susan L. Lebeaux
Assistant General Counsel

Enclosure: Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Republican State Committee
of Delaware and William E. Smith **MUR: 6649**
in his official capacity as treasurer

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Kevin Izzo. *See* 2 U.S.C. § 437g(a)(1).

II. FACTS

Complainant alleges that the Republican State Committee of Delaware and William E. Smith in his official capacity as treasurer (the "Committee"), through its executive director John Fluharty, distributed "public communications" in the form of a nine-page compilation of materials that "clearly identified" Rose Izzo, a candidate in the 2012 Republican primary for Delaware's sole seat in the House of Representatives, and detailed her previous affiliation with the Democratic Party, but did not include a disclaimer.¹ *Compl.* at 1 (Sept. 10, 2012). The referenced communication (or "packet") includes: excerpts from Izzo's campaign materials from previous elections when she ran as a Democrat; photographs of her with prominent Democrats; news articles referencing her status as a Democratic candidate; and a timeline of Izzo's elections in Pennsylvania and Delaware, including the office pursued, the outcome of the election, and her party affiliation. *See id.*, *Attach. 1*. Each page is annotated with comments questioning Izzo's Republican credentials. *Id.* Complainant alleges that the packet was "passed out either by electronic means, by mail distribution or by handing out at meetings in the state of

¹ The Response describes the packet as containing eight pages. *See Resp.* at 1, 2 (Nov. 28, 2012). We believe, however, that the packet contains nine pages. *See Compl.*, *Attach. 1*.

1 Delaware.” Supp. Compl. at 1 (Sept. 20, 2012). He asserts that more than 100 people attended
2 some of the meetings.² *Id.*

3 The Complainant also provided an e-mail dated August 17, 2012, which was forwarded
4 to the Izzo campaign. The e-mail from “Concerned Conservative” attached the packet and states,
5 “I recently attended a meeting and saw some information (attached) that deeply concerned me,”
6 and then goes on to voice concerns about Izzo’s past activities as a Democrat. Supp. Compl.,
7 Attach. The forwarding e-mail dated August 18, 2012, notes that, “Somebody else (concerned
8 conservative-whomever that is) was also at the monday [sic] mtg. and got the same packet I picked
9 up.” *Id.* In addition, the Complainant provided a copy of a posting from a blog called “Resolute
10 Determination,” on which appeared an excerpt from a website called wipeupthemess.com. The
11 posting, written by “C.R.,” reportedly reprints “an email from our inbox” and comments that it
12 “[d]oesn’t seem like the Izzos are as innocent as they claim.” *Id.* The e-mail advises voters to
13 ask Izzo and her husband a series of questions about their backgrounds prior to voting, including
14 her past affiliation as a Democrat, and ends with, “[f]orward this to your Republican friends so
15 they know the truth about Rose Izzo.” *Id.*³

16 In its Response, the Committee states that John Fluharty disbursed

17 5-10 copies [of the packet] at a meeting, but that was all. What those folks
18 who received the information may have done with it is unknown ... but
19 there was simply no mass distribution by the [Committee] of any kind.
20 Other than a handful of copies at one meeting, nothing was distributed by
21 the [Committee].
22

² The Complaint was filed in two parts: the first, filed September 10, 2012 (“Compl.”), attached the nine-page packet, and the second, filed September 20, 2012 (“Supp. Compl.”), attached an e-mail forwarding the same packet, a print-out from a blog post reprinting a posting from a website, and a news article.

³ The Complainant also provides a news article dated September 4, 2012, that recounts the filing of the Complaint in this matter, contains a description of some of the information about the Izzos appearing on the wipeupthemess.com website, and a denial from Izzo’s opponent in the election that he had anything to do with the website. Supp. Compl., Attach.

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1 Resp. at 1. Additionally, the Committee asserts that, “[a]ny suggestion that the [Committee] was
2 actively distributing the packet whether by mail, electronic means, or otherwise, is simply
3 untrue.” *Id.* The Response points out that the e-mail to the Izzo campaign with the packet
4 attached was not sent by the Committee but rather by an individual (apparently a reference to
5 “Concerned Conservative”), and so the e-mail does not constitute evidence that the Committee
6 distributed the packet through electronic means. *Id.* at 2. With respect to the blog posting
7 providing an excerpt from the www.wipeupthemess.com website, the Response denies that the
8 Committee had anything to do with the website or any e-mails touting it. *Id.* It further notes that
9 these materials do not mention any packet akin to the one distributed by the Committee. *Id.*
10 Finally, the Response contends that the Complaint is deficient because the packet does not fall
11 within the Commission’s definition of “public communication” at 11 C.F.R. § 100.26. *Id.*

12 III. LEGAL ANALYSIS

13 The Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission
14 regulations require that all public communications paid for by a candidate or a political
15 committee, and all Internet websites of a political committee, must contain a disclaimer clearly
16 stating that the political committee has paid for it. 2 U.S.C. § 441d(a), 11 C.F.R. § 110.11(a)(1)
17 and (b). A “public communication” is “a communication by means of any broadcast, cable, or
18 satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or
19 telephone bank to the general public, or any other form of general public political advertising.”
20 2 U.S.C. § 431(22); *see also* 11 C.F.R. § 100.26.

21 The Committee asserts that Fluharty distributed only five to ten copies of the packet at
22 one meeting. Complainant presents information showing that the packet also was distributed as
23 an attachment to an August 17, 2012, email from “Concerned Conservative” and provides a

1 posting from the Resolute Determination blog that purports to show that the poster also received
2 the packet electronically. Suppl. Comp. at 3. This blog posting also references a website,
3 www.wipeupthemess.com, that contains "Questions for Rose Izzo" that ask about her schooling,
4 work history, her husband, a court case, and her voting history. *Id.*

5 The Committee denies sending the "Concerned Conservative" e-mail or having anything
6 to do with the website or any e-mails touting it. And the Complainant has presented no evidence
7 to support his allegations that the Committee was involved in the e-mail, the website, and the
8 blog posting.

9 Under these circumstances, the Commission need not address the underlying issue of
10 whether the communication was a "public communication" requiring a disclaimer given that
11 (1) the Committee acknowledges distributing the packet but asserts it distributed only a very
12 limited number at one meeting; (2) anyone who saw or received the packet at the meeting knew
13 the Committee was responsible for the packet; (3) the information we have at this time does not
14 give rise to a reasonable inference that the Committee was responsible for any distribution that
15 occurred outside of the meeting or that such distribution was more than minimal; and (4) the
16 costs of annotating the pages and photocopying and assembling them into a packet would appear
17 to be *de minimis*; we did not locate any costs on the Committee's disclosure reports that appeared
18 to be related to the packet. See Factual & Legal Analysis, at 2, MUR 6256 (Michael Babich)
19 (Commission dismissed the allegation that a leaflet did not contain an appropriate disclaimer
20 based on limited distribution and low production cost); First Gen. Counsel's Rpt. at 3-4 and
21 Certification, MUR 6205 (Fort Bend Democrats) (Commission dismissed the allegation that

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1 Committee triggered the political committee threshold in distributing a door hanger based on the
2 modest amount of money involved).⁴

3 Accordingly, the Commission dismisses the allegation that the Committee violated
4 2 U.S.C. § 441d(a) by failing to include a disclaimer on a packet of annotated photocopied pages.
5 *See Heckler v. Cheney*, 470 U.S. 821 (1985).

⁴ Complainant also alleges that the packet required a disclaimer because it was an "electioneering communication." Compl. at 1. Since the packet was not a broadcast, cable, or satellite communication, however, it does not fit within the definition of "electioneering communication." *See* 11 C.F.R. § 100.29; *see also* Resp. at 2.